No. 8116

United States Circuit Court of Appeals

For the Ninth Circuit

LAU HU YUEN, alias LAU CHOCK WAH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLANT

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I.

STATEMENT OF THE CASE.

This is a deportation proceeding under the Chinese Exclusion Act, brought against Lau Hu Yuen, a Honolulu resident whose citizenship has been recognized by the Immigration Bureau since 1923 when a Board of Special Inquiry admitted him to the Port of Honolulu, causing a Certificate of Identity to be issued attesting to his status. (R. P. 37).

It is now sought, in reversal of the familiar rule that courts cannot interfere with the fair decisions of immigration officers, to set at naught and vacate this 1923 judgment of the Board, because the momentarily incumbent immigration officers suspect it was wrong, though they did not themselves hear the evidence, see the witnesses or participate in the hearing. The trial judge obliged, and from his judgment this appeal is taken. (R. P. 66).

There is nothing new in this case to distinguish it from the string of kindred cases which have come before this court in a weary procession from *Ching Hong Yuk* (23 Fed. (2d) 174) to *Fong Lum Kwai* (49 Fed. (2d) 19), on appeal from the district court in Honolulu. It is, however, true in this case that the Government introduced, over objection, certain records of a local Chinese cemetery, upon some obscure theory they were binding on defendant, though he had had nothing to do with them and was unaware of their existence; but, as will be pointed out hereinafter, they were incompetent and amounted to nothing in the way of proof in support of the Government's burden.

A brief outline should be given here of defendant's 1923 hearing before the Board of Special Inquiry. He arrived from China in April of that year and a board composed of Harry B. Brown, Martha Maier and Louis Caesar was appointed (R. P. 19) to hear such evidence as he might produce concerning his right to admission as a Hawaiian-born citizen. No claim is made that this board was not properly con-

stituted, or that it did not act in good faith or that any undue or improper influence was exerted on it in behalf of the defendant.

The defendant testified at this hearing that he was born in Honolulu, that his father, Lau Ah Chew alias Lau Chun Ng, is still living and in China, that his mother Tom Shee, died in Honolulu "KS 25 5th month, 12th day", and that her remains were taken to China in "CR 6".

After testifying that he left here on the S. S. Doric when two years old, he described his village in China and supplied other details of his family history. (R. P. 19-22). Thereafter three witnesses were examined by the board touching defendant's Hawaiian birth. The first witness, Lau Yen, was asked, referring to Lau Hu Yuen:

> "Q. Where was he born?
> A. Beretania street near Nuuanu.
> Q. How do you know?
> A. I saw him here before about 2 or 3 months after he was born." (R. P. 24).

He further testified that defendant's mother died "KS 25 the 5th month", and that the defendant and his father went to China on the S. S. Doric. In the detention quarters he identified defendant and defendant identified him. (R. P. 25).

The second witness was Lau Kwai. He was asked concerning defendant:

> "Q. Where was he born?
> A. Hawaii—Beretania and Nuuanu.

Q. How do you know that?

A. I saw him a week after he was born." (R. P. 27).

He also described the defendant's family and his departure for China as an infant. The identification was mutual between defendant and witness.

The third witness, Wong Pan Hin, had learned of defendant's Hawaiian birth from the latter's father in China. His testimony revealed an acquaintance, not only with defendant but also with defendant's family, and in his case also the identification was mutual. (R. P. 32).

At the conclusion of the testimony, the board voted unanimously to admit defendant as Hawaiian-born. (R. P. 33). Thereafter, in due course, a Certificate of Identity was issued to him upon his application. (R. P. 35 and 37). He has since continued to reside in Honolulu.

In October 1934, defendant wished to make a visit to China and applied for the certificate issued to Chinese citizens to secure their reentry (R. P. 80); and questioned, as is customary before the issuance of such certificate, he informed the immigration inspector in charge that his mother was buried in the Manoa Chinese Cemetery. This was the first time he had ever mentioned the burial place of his mother. In his 1923 board hearing no reference had been made to it at all. The alert inspector dug up the ancient burial records of this cemetery, which heretofore had never been considered of any value in these cases,

and though he found a record indicating the burial of a Tom Shee as of the date of defendant's mother died, the descriptive matter contained in the record convinced him it pertained to a woman other than defendant's mother. (R. P. 126). The defendant was thereupon charged with having gained his admission by false and fraudulent representations and put to trial, with the result already indicated.

At the trial, defendant's original 1923 landing record, which contained the evidence upon which he was admitted, was introduced in evidence together with his Certificate of Identity. (R. P. 19-38). Having done this, the Government proceeded to put on evidence to show that a certain Tom Shee, who was buried in the Manoa Chinese Cemetery, was not the mother of the defendant but was the mother of certain children who still reside in Honolulu. (R. P. 91-92-93). When the Government rested, the defendant took the stand and testified at great length and with minute detail concerning his birth in Hawaii and family history. (R. P. 127-138). No claim is made that there was any material discrepancy in this testimony. In it he emphasized the fact that his information regarding the date of his mother's death and place of burial was in the nature of hearsay, for when these events occurred he was still an infant in arms less than two years old. (R. P. 128).

II.

ERRORS RELIED UPON.

The assignments of errors specified by appellant are ten in number (R. P. 68), but a determination of seven will dispose of the questions presented by this appeal. These assignments are here presented in the number set forth in the record:

> "2. That the court erred in denying defendant's motion made at the conclusion of plaintiff's case to dismiss the complaint herein and to discharge defendant, for the reason that the evidence adduced by plaintiff wholly failed to establish by requisite evidence the allegations therein contained, to-wit: that said defendant had gained his admission into the United States by false and fraudulent representations and claim of United States citizenship and that he was not lawfully entitled to be and remain in the United States."

> "3. That the court erred in admitting in evidence in the above entitled matter plaintiff's Exhibit IV, being a disinterment permit and in considering the same as evidence material in support of the charge contained in the complaint that defendant had gained his admission into the United States by false and fraudulent representations of citizenship."

> "4. That the court erred in admitting in evidence a certain stub book of the Manoa Chinese Cemetery Association (U. S. Exhibit V) and in considering the same as competent evidence in support of the allegations of the complaint herein that said defendant gained his admission into

the United States as a citizen by false and fraudulent representations."

"5. That the court erred in holding and deciding that said defendant had not sustained the burden of affirmative showing of his right to be and remain in the United States imposed upon him by the Act of May 5, 1892, Title VIII, United States Code, 284."

"7. That the court erred in presuming fraud in connection with the admission of defendant into the United States as a citizen thereof on April 30, 1923, and erred in refusing to accord to the proceedings before the Board of Special Inquiry which attended the admission of said defendant into the United States, as aforesaid, the presumptions of regularity, good faith and bona fides to which said proceedings were entitled."

"8. That the decision of the court in the above entitled matter vacating and setting at naught the decision and findings of the Board of Special Inquiry on April 30, 1923, was erroneous for the reason that the decision and judgment of the court in said matter was made in the absence of evidence establishing fraud and perjury on the part of defendant and his witnesses in their evidence before said Board of Special Inquiry in connection with defendant's admission into the United States, as aforesaid."

"9. That defendant, having been duly admitted at the port of Honolulu by a Board of Special Inquiry, which heard and considered the evidence adduced by defendant and his witnesses to establish defendant's Hawaiian birth and American citizenship, the court erred in vacating

and setting at naught the decision of said Board in the absence of a showing that said defendant and his witnesses conspired together and resorted to perjury before said Board to accomplish defendant's admission."

III.

ARGUMENT.

1. Opening statement.

The evidence before the Board of Special Inquiry in 1923, when defendant's citizenship was the issue, was positive, clear and convincing and not only warranted but required favorable action on the part of the Board. Anything else would have rendered the hearing unfair. (*U. S. v. Brough,* 22 Fed. (2d) 926). The inspector who initiated these proceedings questioned defendant's 1923 witnesses (R. P. 78), but refrained from calling them to the stand, presumably because their testimony would not benefit the Government's case. They were either truthful witnesses or were deliberate perjurers. If deliberate perjurers a fair inference would be that after a lapse of twelve years, when suddenly requestioned by an astute inspector, the false character of their 1923 testimony would have become patent. A perjurer cannot be expected to remember his fabrications indefinitely. Instead of proving these witnesses testified falsely, the Government merely undertook to prove that a certain Mrs. Leong Tom Shee, buried in the Manoa Chinese Cemetery, was not the defendant's mother. Page after

page of the printed record in this case is devoted to this contention. The Government built up a straw man to knock it down.

2. Ancient documents—must be competent.

One who reads this record, bearing in mind recent decisions of this court (*Fong Lum Kwai v. U. S.*, 49 Fed. (2d) 19; *Lee Choy v. U. S.*, 49 Fed. (2d) 24; *Choy Yuen Chan v. U. S.*, 30 Fed. (2d) 516; *Leong Kwai Yim v. U. S.*, 31 Fed. (2d) 738 and *Lum Man Shing v. U. S.*, 29 Fed. (2d) 500), must wonder upon what theory this case is prosecuted. The cases cited have made it abundantly clear that where the citizenship of a Chinese has been determined by a Board of Special Inquiry, satisfactory proof of fraud must be adduced to warrant rescission of the board's action.

In this particular case proof of fraud would necessarily involve a finding that defendant and his witnesses had committed deliberate perjury in their 1923 testimony. This is so because their testimony was positive and, in the case of at least two witnesses, was based on first-hand knowledge. So the concomitant of proof of fraud would be proof or perjury. This was the burden assumed by the Government, yet it made no effort to meet it by showing the witnesses were falsifiers. They had questioned them before the hearing of this case (R. P. 78) but chose not to call them to the stand, and no evidence was introduced to impeach them.

The Government merely put in evidence defendant's landing record and his Certificate of Identity and then

unexpectedly devoted itself, over objection, to a line of evidence relating to records covering the death of Mrs. Leong Tom Shee, concerning which some comment will now be made.

There is a Chinese cemetery in Honolulu known as the Manoa Chinese Cemetery, which has been in existence since 1894. (R. P. 125). It functions through a president (R. P. 107), a treasurer (R. P. 117), and presumably other officers including directors. (R. P. 116). The members of the association were apparently entitled to free burial, while a charge was made for those who were not members. (R. P. 110). Small books were printed, shaped something like promissory note books (R. P. 106), and from these permits were issued similar to U. S. Exhibit 5 (R. P. 126) authorizing a particular burial. It was not shown how many of these books were currently used, or what officers, beside the treasurer, issued the permits, or whether permits were issued for all burials. When these books were used up and nothing remained but the stubs they were thrown into iron boxes (R. P. 108) and no attention paid to them. In 1928 Leong Wah Hin, who was treasurer, became interested in collecting the data contained in these small books, copying it in one big book, and he engaged Leong Yit Cho to help him (R. P. 104), but the work was never finished, and most of the small books covering the early years of the association presumably were lost or destroyed. (R. P. 106 and 107). Leong Wah Hin said he left them in his store when the creditors closed it and he had never seen them since. (R. P. 107). At least

one small book survived and, over objection of defendant, a record was taken from it, indicating the burial in the cemetery in 1899 of Mrs. Leong Tom Shee.

This record was admitted in evidence on the theory it was an "ancient document". But whether ancient document or not, it obviously was inadmissible against defendant. Mrs. Leong was unrelated to him; he did not know her and the records of the cemetery were pure hearsay, so far as he was concerned. The ancient document rule does not mean, as the court apparently believed, that because a record is 30 years old it may, *ipso facto,* be admitted in evidence against a defendant. To be admitted, it must be otherwise admissible. The ancient document rule merely dispenses with the formalities of certain preliminary proof, concerning genuineness of the document. (*King v. Watkins,* 98 Fed. 913; *Cooper v. Williamson,* 191 Ky. 213; *Budlong v. Budlong,* (R. I.) 136 Atl. 308). The rule merely presumes the genuineness of the document. (*Gwin v. Calegaria,* 129 Cal. 384; 22 *C. J.,* p. 946).

Wigmore in his *1934 Supplement to his Treatise on Evidence,* Section 2145-a says:

> "The present principle (ancient document rule) deals only with the authentication of the document; whether the contents are material, or whether any statement or assertion contained in them is admissible for any purpose, should depend on different principles. Such statements may or may not be admissible under some exception to the hearsay rule, and their admissibility

must of course, depend upon the appropriate principle."

See also *King v. Watkins,* supra.

The burial record of Mrs. Leong had nothing to do with defendant and the court erred in admitting it, just as it erred in admitting various immigration records against a defendant in *Lee Choy v. U. S.,* 49 Fed. (2d) 25.

It is significant that the Government did not undertake to prove defendant's mother was not buried in the Manoa Chinese Cemetery, as defendant claimed. Not a scintilla of evidence was offered to refute defendant's testimony on this point. The utmost the Government proved was that Mrs. Leong was buried there and that she was not defendant's mother. Defendant never claimed she was his mother. He was a member of the Lau family, she of the Leong.

Even if this burial record were germane to the issues, it would be inadmissible upon this state of the record. There was no showing when the record was made, whether it was made contemporaneously with the events recorded, or made long subsequent, or that the information contained in it was obtained from trustworthy sources, or that the person making the record was under some obligation to do so, with no motive to misrepresent, or that it was a part of a system of entries, rather than a casual, isolated one. (See *Budlong v. Budlong,* supra). But of course, so far as defendant was concerned, it was hearsay and the court erred in admitting it and giving it important

if not controlling weight. We doubt if anyone would seriously argue that such a piece of loose, nondescript evidence could be admitted against a defendant in a civil suit, where his property rights are concerned or in a criminal case where his liberty is at stake, and we say it should not be admitted in a deportation case where *"perhaps all that makes life worth living"* for defendant is involved. (*Ng Fung Ho v. White,* 259 U. S. 276, 42 Sup. Ct. 492).

If this type of evidence may be used, then there is no reason why immigration officers may not deport practically any Chinese they choose who has been admitted here within the last decade or two, by finding in the ancient records of one of the several Chinese cemeteries in Honolulu, the name of a woman somewhat similar to the victim's mother, and then proceed as they did in this case. The danger of such *carté blanché* cannot be overemphasized.

3. Necessity of proof of fraud.

The trial court's decision (R. P. 41 to 65) reveals a distinct unwillingness to apply the rule so frequently applied in these cases (*Moy Kong Chiu v. U. S.,* 246 Fed. (7th) 94; *Fong Lum Kwai v. U. S.,* 49 Fed. (2d) 19; *Lee Choy v. U. S.,* 49 Fed. (2d) 24; *Ong Chew Lung v. Burnett,* 232 Fed. 853; *Lui Hip Chin v. Plummer,* 238 Fed. 763; *U. S. v. Hom Lim,* 214 Fed. 456 at 463), that where a Certificate of Identity is issued and a proceeding brought to eject the holder from this country, the burden is on the Government to show by evidence which the law recognizes as proof, that he obtained the certificate by fraud.

The trial judge's problem would have been very simple in this case had been willing to apply this oft-repeated formula. But apparently realizing there was no competent evidence of fraud, he picked out a casual word from a decision here and there, and finally wound up by making this wholly incorrect statement of the law.

> "The Certificate of Identity is prima facie evidence of the right of the defendant to be and remain in the United Staes, but is nothing more, and when such prima facie evidence is overcome by affirmative, legal, competent and admissible evidence which leads the court to believe the holder was not entitled to its issuance, the probative effect of the certificate is lost and defendant, being of Chinese descent, must establish his right to remain." (R. P. 53).

If the trial judge had simply said the obviously correct thing, that the evidence of the character described must prove fraudulent entry or illegal presence, he would have been correct, but he was endeavoring to gloss over the necessity of fraud being shown, which led him into a rank misstatement of the law. It is quite apparent that a federal court can only intermeddle in the administration of the Chinese Exclusion Act when the Chinese involved is illegally in the United States. The claimed illegal presence of the Chinese is essential to give the court jurisdiction; but, according to the trial judge, the federal court has jurisdiction where a Chinese though legally in this country is wrongfully in possession of a Certificate of

Identity—such as Chinese laborers, lawfully residing here but improperly in possession of merchants' Certificates of Identity. In such case the court has no jurisdiction whatever. The ample powers of the Immigration Bureau would handle that situation under rules prescribed for that purpose. (Rule 19, Governing Chinese, Department of Labor). See reference made to these rules in *Ching Hong Yuk v. U. S.,* 23 Fed. (2d) 174.

Before writing the quoted paragraph, the trial judge, as we said, taking a chance word from a decision here and there, expressed the opinion that proof of fraud was not necessary; the same result could be accomplished for "other valid reasons". What these other valid reasons were, he did not say and doubtless could not say; for fraud in one form or another is the necessary ingredient in the Government's complaint. And in this case, it was the rankest of all frauds—perjury—or it was nothing. It passeth understanding and defies logic to grasp the court's mental meanderings.

This chapter of his decision is but typical of the whole.

4. No burden on defendant.

The next surprising thing in the judge's decision was an animadversion against defendant because he did not call his 1923 witnesses. (R. P. 52). There appeared no reason why he should have called them. Their 1923 testimony was already before the court, uncontradicted and unimpeached. A party need not

call a witness merely to reiterate his previous testimony. Moreover, in this case the Government had the burden of proving fraud and unless it proved fraud, which it didn't defendant need do nothing more than offer in evidence his landing record and Certificate of Identity. It is absurd for the court to say that because defendant did not call these witnesses an inference should be drawn against him, when, in saying this, he knew that these same witnesses had been questioned by the Immigration officer who instituted these proceedings and that officer declined to put them on the stand! If an inference is to be drawn for not calling them then it must be drawn against the party who had the burden of proof. Their 1923 testimony is presumed to be truthful and correct.

5. Double standard of fraud.

The burden, as we have shown, was on the Government to prove fraud. Fraud is never presumed but must be proved by clear and convincing evidence, the most frequently used expressions being "clear, cogent and convincing", or "clear, unequivocal and convincing". (*Griffith v. Commissioner of Internal Revenue,* 50 Fed. (2d) 782 (7th C. C. A.); *Tucker v. Traylor Eng. & Mfg. Co.,* 48 Fed. (2d) 783 (10th C. C. A.); *Blakeslee v. Wallace,* 45 Fed. (2d) 347 (6th C. C. A.); *Maryland Casualty Co. v. Palmetto Coal Company,* 40 Fed. (2d) 374 (4th C. C. A.); *U. S. v. Mammoth Oil Co.,* 14 Fed. (2d) 705 (8th C. C. A.); 27 *C. J.* 62, Par. 199).

The trial judge was unwilling to apply this standard of proof to the case at bar. He readily conceded that

the proof of fraud, in a proceeding to take away his property, must be clear, cogent and convincing, but he was adamant in insisting that the *quantum* of such proof was immeasurably lower, where the issue concerned only the right of a lowly Chinaman to glean the meager enjoyments of his birthright. We turn from such a contention with pardonable nausea.

6. Departure and death records.

In practically all the Chinese deportation cases which have come before this court from the district court in Hawaii resulting in reversals, the claim has been made that the defendant used a death or departure record which did not belong to him. The worthless character of these death and departure records has been demonstrated time and again, the last times perhaps in the *Fong Lum Kwai* and *Lee Choy* cases, supra. The same claim is made as was made in those cases.

In the early days, when Hawaii was shifting from a monarchy to an independent republic, the records of births, deaths and marriages were so meager as to be "of very little value from a statistical standpoint". The quoted phrase is contained in the 1899 report of the President of the Board of Health to the President of the Republic of Hawaii. (Vol. 1, Territorial Reports, 1900, Archives of Hawaii).

If all deaths were reported during the period in question, it is impossible to say how many Tam Shees or Tom Sees or Tam Sees or Tom Shees—various authorized spellings (R. P. 47)—would have been

revealed. But even as it was, two were shown, a Tam Shee who died in 1898 at 31 (R. P. 90) and a Tom Shee who died 1899 at 38. (R. P. 88).

7. Disinterment of defendant's mother.

The defendant testified that the remains of his mother had been removed to China and the Government disputed that fact and undertook to show that a disinterment permit had not been issued for that purpose in the year 1917. The defendant never testified when his mother's body was disinterred—his testimony related only to when her body was returned to China. These two events—disinterment and removal to China—are frequently separated by substantial stretches of time. It appears to be the practice for the body to be disinterred and kept at some convenient place until a friend or relative is ready to take it to China. In the case of Mrs. Leong Tom Shee, her disinterment occurred in 1917 (R. P. 83) but her remains were not taken to China until three years later. (R. P. 84 and 92). The defendant living in China at the time would have no means of knowing when the body of his mother was disinterred. Moreover, while disinterment permits are issued by the Board of Health, no one familiar with the situation would seriously argue that disinterments are not frequently made without the formality of procuring a permit. And this was especially so in the early days of the Territory. In the annual report of the President of the Board of Health to the Governor in 1902, the following statement was made:

"Regulations of the Board of Health require a permit before any body can be exhumed; but no official is usually present that can be spared from the inadequate staff of the Board to enforce this regulation. Parties could, therefore, disinter any body without respect to the cause of death and send it to China and years after apply to the office for disinterment permit and the Board would be none the wiser." (Board of Health Report, 1902, page 304—Archives of Hawaii).

IV.

CONCLUSION.

It is respectfully submitted that the Government has wholly failed to prove the charge contained in the complaint, and that the decision of the trial court should be reversed and the defendant discharged.

Respectfully submitted,

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